Office-Supreme Court, U.S.
FILED
JAN 7 1963
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1962

No. 502

KENNETH C. RAINS, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEBRASKA

CLARENCE A. H. MEYER,
Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska
CECIL S. BRUBAKER,
Assistant Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska
Counsel for Respondent.

INDEX

Subject Index

	Page
Jurisdiction	1
Questions Presented for Review	2
Statement of the Case	2
Argument	2
Preface	2
Argument I	2
Argument II	7
Argument III	10
Conclusion	11

Cases Cited

Application of Baer, CA N. J. 1948, 169 F. 2d 770	9
Botnwell v. Buckbee-Mears Co., Minn. 1927, 48 S. Ct. 124, 275 U. S. 274, 72 L. Ed. 277	6
Cox v. Texas, Tex. 1906, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099	10
Grand Gulf R. etc. Co. v. Marshall, La. 1851, 12 How. 165, 13 L. Ed. 938	6
In re Kemmler, N. Y. 1890, 10 S. Ct. 930, 136 U. S. 436, 34 L. Ed. 519	10
McDonald v. Oregon, etc. Nav. Co., Or. 1914, 34 S. Ct. 772, 233 U. S. 665, 58 L. Ed. 1145	11
McGoldrick v. Compagnie Generale Atlantique, N. Y. 1904, 60 S. Ct. 670, 309 U. S. 430, 84 L. Ed. 849	6, 10
Nickel v. Cole, Nev. 1921, 41 S. Ct. 467, 256 U. S. 222, 65 L. Ed. 900	10
Rains v. State, 173 Neb. 586, 597, 114 N. W. 2d 399, 405	4

Page

Screven County v. Brier Creek Hunting and Fishing Club Inc., CA Ga., 1953, 202 F. 2d 369 9
Shemaitis v. Reid CA Ill. 1951, 193 F. 2d 149 10
Shores v. United States, 174 F. 2d 838, 11 A. L. R. 2d 635 9

Constitutions Cited

Fourteenth Amendment to the United States Constitution 5, 9

Statutes Cited

Section 25-1233, R. R. S. 1943 3, 5, 8, 11
28 U. S. C. 1257 (3) 1

In The

Supreme Court of the United States

October Term, 1962

No. 502

KENNETH C. RAINS, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEBRASKA

CLARENCE A. H. MEYER,
Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska
CECIL S. BRUBAKER,
Assistant Attorney General, State of Nebraska,
Capitol Building, Lincoln, Nebraska
Counsel for Respondent.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is apparently invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. May the validity of a state statute be considered on certiorari when such question was not presented to nor decided by the state court?

2. Will this court grant certiorari to review a decision of the state court where the basis of the state court's decision makes consideration of an asserted federal question unnecessary?

STATEMENT OF THE CASE

The respondent accepts, as substantially correct, the statement of the case by the petitioner, except for differences with respect to the contents of the motion of the state for production of a witness, and the contents of the affidavit supporting the motion of petitioner to take depositions. These differences will be indicated in argument hereafter.

ARGUMENT

Preface

In a prosecution for arson, the defendant (petitioner here) moved prior to trial for an order to take the depositions of two witnesses, Jungclaus and Jones, who were confined in prison and who were endorsed on the information as witnesses for the state. The motion (R. 36) was as follows:

> "Comes now the defendant in the above and foregoing matter, by his attorneys, and hereby respectfully moves the court for an Order granting the taking of depositions of Herman R. Jungclaus and Howard Jones, who are at the present time held in confinement. The defendant further moves

the court that the court set a time and place for the taking of said depositions."

It was supported by an affidavit (R. 35), which was as follows:

"Lloyd W. Kelly, Jr. being first duly sworn on oath deposes and says that he is one of the attorneys for the defendant, Kenneth C. Rains; that the defendant, Kenneth C. Rains, has been served with an Information charging him with the crime of arson; that in said Information, there are endorsed the names of several witnesses, two of whom are Herman R. Jungclaus and Howard Jones, who will appear at the trial as witnesses for the State of Nebraska; that both of said witnesses are now confined in a penal institution; that the nature of the crime charged is such that it will be necessary for the defendant to ascertain various times, dates and places which allegedly will be testified to by one or both of the above witnesses, in order to properly defend himself of the crime charged; that the defendant is desirous of taking the depositions of the two above named witnesses."

The petitioner assigned as error the overruling of this motion (R. 3,4,5).

In his brief before the Nebraska Supreme Court, the petitioner argued only that he should have been given the opportunity to take the depositions of these two witnesses. No mention was made of any deprivation of constitutional rights by the ruling of the trial court denying him the request.

In its opinion, the Nebraska Supreme Court held that Section 25-1233, R. R. S. 1943 applied to the case; that the defendant could take depositions, but that in

order to do so he must make a showing as to what material evidence would be adduced by the witness in behalf of the defendant relating to the defendant's defense if the motion to take his deposition was granted. The court held that the showing made by the defendant here was inadequate and insufficient, and that the trial court therefore did not abuse its discretion in refusing the motion. *Rains* v. *State*, 173 Neb. 586, 597, 114 N. W. 2d 399, 405; found also in appendage to petition for certiorari herein, page 26.

Then, for the first time, the petitioner sought to raise questions of violation of constitutional rights. In his motion for rehearing and brief in support thereof (R. 131), he assigns error as follows:

> "1. The court erred in holding that the plaintiff in error did not make sufficient showing to take the depositions requested in the affidavit filed herein.
>
> "2. The court by its opinion in construing Section 25-1233, R. R. S. 1943, has raised a question under the United States Constitution, and that the plaintiff in error has been denied due process of law, under Amendment XIV, Section I.
>
> "3. * * * * *." (Motion for Rehearing and Brief in Support Thereof; page 2.)

The argument on the first assignment makes no mention of any constitutional rights, but merely criticizes the conclusion reached by the Nebraska Supreme Court as to the suffficiency of the showing.

The argument with respect to the claimed violation of constitutional rights is set out at pages 5 and 6 of that Motion for Rehearing. We produce it in full, ex-

cept for the quotation of the Fourteenth Amendment:

"* * * * *

"The court herein by its construction of Section 25-1233 of the Revised Statutes of the State of Nebraska, and as they have applied it to the plaintiff in error in the instant case, has denied the plaintiff in error the equal protection of the laws by not permitting the plaintiff in error to take the depositions of witnesses and allowing him to defend himself in this criminal action. This court should consider the fact that the plaintiff in error was not given the oppportunity to defend himself, and that this court by construing the above quoted statute in the manner as it has, in its opinion, has not afforded the plaintiff in error an equal protection under the laws, and has denied him the opportunity of obtaining evidence of witnesses who would permit him to better prepare his defense herein or testify, as the witness, Jungclaus, would have done in his behalf at the time of trial.

"* * * * *"

I.

A Claim Not Asserted in State Courts Will Not Be Considered on Certiorari to the Supreme Court.

In the first division of argument in his petition for certiorari, the petitioner claims Section 25-1233, R. R. S. 1943, is unconstitutional because it treats defendants within the county where witnesses are imprisoned differently from defendants who are outside the county where witnesses are imprisoned, with respect to obtaining their testimony.

It is obvious from the pertinent assignments of error made by petitioner before the Nebraska Supreme Court

and the argument presented in support thereof, both of which we have quoted in full, that no mention was ever made of the invalidity of any statute. It is likewise obvious, even from the statement of the case by petitioner, that the situation here did not involve defendants both within and outside the county of incarceration of a witness.

It is the rule, as we understand it, that a claim not asserted in state courts will not be considered on certiorari to the Supreme Court. *Bothwell* v. *Buckbee-Mears Co.*, Minn. 1927, 48 S. Ct. 124, 275 U. S. 274, 72 L. Ed. 277. It is likewise the rule that in cases from state courts in which a state statute is assailed as unconstitutional, the United States Supreme Court should refrain from deciding questions not presented or decided in the highest court of the state whose judicial action is under review. *McGoldrick* v. *Compagnie Generale Atlantique*, N. Y. 1940, 60 S. Ct. 670, 309 U. S. 430, 84 L. Ed. 849.

We conclude that this claim of invalidity of a statute is not properly before this court.

The assignment of error and the discussion does complain as to the construction of the statute involved. Ordinarily a decision of the state court resting upon the construction and not upon the validity of a statute of the state does not present a federal question. See, *Grand Gulf R. etc. Co.* v. *Marshall*, La. 1851, 12 How. 165, 13 L. Ed. 938. We shall discuss the ruling of the court at some length hereafter.

II.

The United States Supreme Court Will Not Grant Certiorari to Review a Decision of the State Court Where the Basis of the State Court's Decision Makes Consideration of an Asserted Federal Question Unnecessary.

The assignment of error and argument in support thereof made by the petitioner in his Motion for Rehearing before the Nebraska Supreme Court do not specify what the petitioner had in mind when he complains of a lack of equal protection of the laws. Equal to what? He made no comparisons in his argument before the Nebraska Supreme Court. He made only a bare claim that he had been denied equal protection of the laws. But now, in his petition for certiorari, he seeks to compare the production of a witness by the state with the depositions he sought, saying that his showing for getting the depositions was the same or substantially the same as the showing of the state to produce a witness, and, if we understand him correctly, that to deny him the depositions was not only a denial of protection of the law equal to that given the state, but also a denial of due process because it prevented his defense.

The comparison was not brought to the attention of the Nebraska Supreme Court, and we think therefore it may be assumed that that court did not consider it. The petitioner seeks to put the state and himself in the same or similar circumstances, in order to make his point. The record does not support his position.

The state, by application to the trial court, requested that the warden of the penitentiary be directed "to produce the body of Howard Jones" (R. 23), saying

that he was "a material and essential witness in the State's case against the said Kenneth C. Rains", the petitioner. This request for the production of a witness was in the nature of an application for a writ of habeas corpus ad testificandum. It was most certainly not based upon any authority in Section 25-1233, R. R. S. 1943, which limits production of witnesses who are imprisoned to the county in which the witness is imprisoned. This trial took place some several counties away. Certainly, then, Section 25-1233 was not being applied unequally to the state and to the petitioner.

There is an important difference, too, in the purpose for which the witness Jones was produced for the state, and the purpose for which petitioner sought to take the deposition of both Jones and Jungclaus. While the petitioner here strives to make it appear that his request and that of the state were similar, it is evident from his showing by affidavit that this is not so. He did not, at any time previous to his motion for rehearing, ever claim that Jungclaus would present evidence in his behalf. Had that actually been the case, he would no doubt have sought his production as a witness, just as the state did for Jones. The showing of the affidavit is plain. Petitioner expected Jungclaus and Jones both to be witnesses for the state, for they were endorsed on the information as such witnesses. Petitioner didn't want either of them at the trial as witnesses. He wanted only to take their depositions to discover what they were going to say, so that he could then prepare to meet the expected testimony. This is what he said in the affidavit. He seeks now to give the impression that he was deprived of the right to produce either this witness in his behalf, or testimony by deposition of the witness, in his behalf. This is

plainly not true. He made no attempt whatever to produce this witness Jungclaus, and the deposition sought was not "in his behalf", but was only for the purpose of discovery.

This is what the Nebraska court has said was lacking in the showing of the petitioner for the taking of the deposition. The Nebraska Supreme Court said that it was not an abuse of discretion for the trial court to deny the taking of the depositions, because in order to do so, defendant must have shown what material evidence was to be adduced *in behalf of the defendant relating to the defendant's defense*. The Nebraska Supreme Court was not opening the door to unlimited discovery proceedings in criminal cases. The common law recognized no right of discovery in criminal cases. *Shores* v. *United States*, 174 F. 2d 838, 11 A. L. R. 2d 635. And the Fourteenth Amendment to the United States Constitution did not create any new rights to life, liberty, or due process of law, but merely preserved common-law rights. *Screven County* v. *Brier Creek Hunting and Fishing Club, Inc.*, CA Ga., 1953, 202 F. 2d 369.

In ruling that a showing of materiality of the testimony sought in behalf of the defendant relating to his defense was necessary, and that petitioner had failed to make such showing, the court had before it no federal question, and the attempt to inject questions of due process and equal protection of the laws is without basis in the record.

The lack of any necessity for deciding any federal question in the construction of the state statute as the Nebraska Supreme Court did affords no basis for the granting of certiorari. *Application of Baer*, CA N. J.

1948, 169 F. 2d 770; *Nickel* v. *Cole*, Nev. 1921, 41 S. Ct. 467, 256 U. S. 222, 65 L. Ed. 900; *Cox* v. *Texas*, Tex. 1906, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099; *McGoldrick* v. *Compagnie Generale Atlantique*, N. Y. 1940, 60 S. Ct. 670, 309 U. S. 430, 84 L. Ed. 849; *In re Kemmler*, N. Y. 1890, 10 S. Ct. 930, 136 U. S. 436, 34 L. Ed. 519.

III.

Complaint that a Decision of a State Court Was Erroneous Does Not Present a Question of Want of Due Process.

In the third division of his argument, the petitioner seeks to indicate that the decision of the Nebraska Supreme Court that petitioner had not made a sufficient showing for the taking of the requested depositions was in error, and that therefore petitioner was, in effect, denied an opportunity to be heard, and that this deprived him of due process of law. This, again, gives the impression that the witness Jungclaus was to be a witness in behalf of the petitioner. We have shown that no such thing was intended, nor expected, nor was the request based on any such premise. The claim is therefore without basis in the record.

Furthermore, want of due process under the appropriate clause of the Fourteenth Amendment is not established by showing that a decision complained of was erroneous. *Shemaitis* v. *Reid*, CA Ill. 1951, 193 F. 2d 119. This court has previously said that:

"* * * * *

"* * * It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure or give jurisdiction to this court

to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character. * * *

"* * * * * *" (*McDonald* v. *Oregon, etc. Nav. Co.*, Or. 1914, 34 S. Ct. 772, 233 U. S. 665, 58 L. Ed. 1145.)

CONCLUSION

The petitioner seeks to create the impression that the witness Jungclaus was to present evidence in his behalf, and that denying the taking of the depositions, deprived him of protection of the law equal to that given the state and prevented him from being heard. The record and the opinion of the court amply demonstrate that this is not so. The ruling of the Nebraska Supreme Court did not prevent the taking of depositions in a proper case. Instead, it specifically pointed out that depositions could be taken, under the authority of Section 25-1233, R. R. S. 1943, but it shut the door to the taking of depositions for discovery purposes, and limited the taking of such depositions to those situations where there is a showing as to what material evidence is to be adduced *in behalf of the defendant relating to the defendant's defense*. That the petitioner made no such showing is evident from the affidavit and the record.

The decision of the Nebraska Supreme Court upholding the denial of the request to take depositions in this case did not involve any federal question, and certiorari should be denied.

Respectfully submitted,

CLARENCE A. H. MEYER,
Attorney General,
State of Nebraska
CECIL S. BRUBAKER,
Assistant Attorney General
Counsel for Respondent.